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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

THE CITY OF LOS ANGELES,

Petitioner,

vs.

SOCIETA PER AZIONI DE NAVIGAZIONE ITALIA, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the "Saving to Suitors" clause of 28 U.S.C. §1333 allows a state court to impose its own liability laws to determine responsibility for vessel accidents when this law conflicts with the principles established by ***United States v. SS Van Buren***, 490 F.2d 504 (9th Cir. 1973), and when the application of state law allows liability for vessel accidents to vary from state to state and to vary even within a state depending on whether suit is filed in state or federal court.

2. Whether the California Supreme Court has misapplied the borrowed servant doctrine applicable to admiralty matters by looking to the *status* of the City as a general employer rather than the *control* exercised by the vessel master over the pilot at the time of the accident.

PARTIES IN THE COURT BELOW

Shipowner SOCIETA sued the City and City cross-complained against SOCIETA. The pilot was not a party to this action. SOCIETA and City jointly agreed to pay the damages of an innocent party, Union Oil Company, which intervened. Therefore, Union Oil Company did not participate in the trial or appeal of this matter.

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PETITION FOR WRIT OF CERTIORARI
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OPINION BELOW

The California Supreme Court ("Court"), applying state not federal law, struck down a City of Los Angeles Tariff Pilotage provision as contrary to the California Tort Claims Act. A comparable pilotage provision has been enforced by the Ninth Circuit in *United States v. SS Van Buren*, 490 F.2d 504 (9th Cir. 1973). The Court also held that a port pilot

supervised solely by the vessel master at the time of the accident was an employee of both the City and the vessel owner for liability purposes. The opinion is reported at 31 Cal.3d 446, copy attached as Appendix "A." In doing so, the Court reversed a California Court of Appeal decision holding that the pilot was solely an employee of the vessel. Although the Court has remanded the case to the trial court on a limited issue, the two legal principles applied by the Court and challenged here are not affected by the remand. [1/]

JURISDICTION

Petitioner was the respondent in the California Supreme Court. The Court's original opinion and judgment were entered on May 24, 1982. Petitioner requested a rehearing. The June 23, 1982 order denying rehearing is set forth in Appendix "B." This petition is timely filed within ninety days of the denial of rehearing [28 U.S.C.§2101(c)]; Supreme Court Rules, Rule 207. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), §1331(a), 46 U.S.C. §211 and Art. III, §2, cl. 1 of the United States Constitution.

1/ The City is aware of this Court's decision in ***O'Dell v. Espinoza***, 102 S.Ct. 1865 (1982) and believes the limited remand does not affect the City's right to petition for certiorari. This Petition is not premature because, as recognized in ***Cox Broadcasting Corp. v. Cohn***, 420 U.S. 469, 477, the principles decided by the California Supreme Court will survive the remand and require decision. The trial court on remand is to apportion liability for the pilot's negligence between the vessel and the City.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States, Art. III, §2, cl. 1. Appendix C.
2. 28 U.S.C. §1257, §1333(1), 46 U.S.C. §211, Appendix C.
3. California Harbor Navigation Code, §820, Appendix C.

STATEMENT OF THE CASE

1. Proceedings Below

In 1975, shipowner SOCIETA DE NAVIGAZIONE ITALIA ("SOCIETA") filed a complaint in the California Superior Court against City alleging that an accident in which its vessel DA VERRAZANO was involved was caused by the negligence of a pilot in the general employ of the City. The suit requested indemnity for any monies SOCIETA might have to pay to Union Oil Company, a damaged third party. In its answer, the City alleged that the pilot was the servant of the vessel at the time of the accident and was therefore the responsibility of the shipowner. City also contended the pilotage provisions of the City tariff, as a tariff and as a contract, required the vessel to indemnify the City for any liability it might sustain while the pilot was under the direction and control of the vessel. The City also cross-complained against SOCIETA for damages to its wharf.

The trial court granted shipowner's motion for partial summary judgment, holding that the City's Tariff Item 205(e) was void under state law. A copy of this Order is attached as Appendix "D." A copy of the Tariff Item is attached as Appendix "E." At trial, the court ruled the pilot was solely the City's employee and refused to apply the City's Tariff Pilotage provisions, considering itself bound by the earlier motion. Proceeding on a straight negligence basis, the court found that the accident was caused 25 percent by the negligence of SOCIETA's crew and 75 percent by the pilot.

On appeal, the California Court of Appeal determined that the pilot was solely the employee of the vessel at the time of the accident and therefore did not decide whether the tariff was declarative of federal law or whether it should apply the tariff as a contract. The California Supreme Court granted certiorari and held the pilot was the dual employee of the City and the vessel based on a finding that the City's tariff pilotage provisions violated the California Tort Claims Act. Thus, it found that state, not federal law, controlled the issue. It also declined to find that the tariff terms were incorporated into an implied contract between the City and SOCIETA.

2. Facts

a. The Accident

On July 3, 1974, the Italian vessel, DA VERRAZANO, allided with Berth 150 in the harbor at Los Angeles

destroying a portion of the City's wharf and certain equipment owned by Union Oil Company. The DA VERRAZANO was under the command of its master, Captain Panizzi, who was assisted by Captain Peterson, a pilot generally in the employ of City and made available to the vessel pursuant to the terms of Item 205 of City's tariff. The shipowner did not contend that the accident was caused by wiliful action of the pilot or gross negligence of the pilot, both of which are the responsibility of the City pursuant to Tariff Item 205(e). Instead, the shipowner contended the accident was caused by improper orders requested by the pilot which were implemented by the master and crew.

b. Request for Pilotage Service

The Los Angeles Harbor Department, a department of the City, manages the Los Angeles harbor. [2/] The City does not itself carry on the business of shipping. Rather, as a landlord, the City provides land and water areas with berths suitable for loading and unloading cargo to vessels in interstate and foreign commerce.

To carry out their operations, vessels need berths, pilots to locate and reach the berths, linesmen to tie up the vessels, and longshoremen to handle the cargo. The vessels rely on local agents located near the harbor to arrange

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2/ Article XI of the Los Angeles City Charter empowers the Harbor Department to manage the harbor district. The harbor district comprises various lands and waters granted to the City as trustee by the State to be maintained for commerce, navigation and fishing.

these services. On the day of the accident, the pilotage services were requested by the vessel's agent, General Steamship Corporation.

c. Tariff Item 205

Appendix "E," Los Angeles Tariff Item 205, sets forth the terms and conditions under which the City offers pilotage services to vessels calling at the port. The Item provides that pilotage is voluntary [205(a)], that the pilot is to make available his knowledge of local conditions to the vessel [205(b)], and that the vessel owner has the sole duty to navigate the vessel and accepts the pilot as an adviser only [205(c)]. Tariff Item 205(e) specifically provides that the services of the pilot are offered to the vessel on the express understanding that the pilot is the servant of the vessel subject to its command and are offered only upon the condition that, in the event of an accident, the vessel owner agrees to indemnify and defend the City and the pilot for any damages. Item 205(f) provides that the pilotage charges have been computed taking into account the terms upon which the service is offered.

The Court held Item 205(e) violated the California Tort Claims Act. As noted in the lower left hand corner of Item 205, Tariff items are Ordinances of the City. The City contends that Item 205(e) is valid, not because it can as a municipality supersede state law, but because the City's tariff is declarative of the federal admiralty law.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This Court should issue a Writ of Certiorari to the California Supreme Court because that Court applied state law to certain issues and incorrectly applied federal law to other issues thereby destroying needed uniformity in the admiralty law.

I.

THE CALIFORNIA SUPREME COURT BY APPLYING STATE LAW EXCEEDED THE JURISDICTION ALLOWED TO THE STATE UNDER THE SAVING TO SUITORS CLAUSE OF 28 U.S.C. §1333(1) AND DESTROYED THE POSSIBILITY OF A UNIFORM MARITIME LAW.

Pursuant to 28 U.S.C. §1333 district courts have original jurisdiction over all civil maritime matters except that suitors have the right to pursue all other remedies to which they are entitled. Although the law has long recognized that *in personam* suits arising from vessel accidents may be brought in state court, states may not apply their laws when to do so would interfere with the uniformity and characteristic features of the federal maritime law. ***Askew v. American Waterways Operators, Inc.*** (1973) 411 U.S. 325, 338-340. As noted by the California Supreme Court in footnote 10 of its decision, 46 U.S.C. §211, which

delegates to the states the power to regulate pilotage, does not affect this principle since this delegation has traditionally been viewed only as encompassing such matters as licensing fees and the like.

In SOCIETA, the California Supreme Court exceeded the jurisdiction allowed it by the savings to suitors clause by determining liability for vessel accidents under state law. The Court set aside the clear principle which it itself had recognized in its decision of ***Intagliata v. Shipowners and Merchants Towboat Co., Ltd.*** (1945) 26 Cal.2d 365, in which it recognized that federal law governs the consequences of the fault of parties involved in vessel accidents. The effect of the SOCIETA decision is that liability for factually identical pilot-involved accidents will vary from state to state and even within a state depending on whether the case is brought in state or federal court.

II.

THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH THE FEDERAL ADMIRALTY LAW AS SET FORTH IN *UNITED STATES v. SS PRESIDENT VAN BUREN* [(9th Cir. 1973) 490 F.2d 504].

The Southern California harbors of Los Angeles and Long Beach are adjacent. For more than thirty years, these ports, managed by independent charter cities, have published tariffs offering pilotage services. Both Los Angeles and Long Beach in 1955 had compulsory pilotage tariff

provisions requiring vessels calling at the ports to select a city pilot. In 1955 in ***City of Long Beach v. American President Lines***, 223 F.2d 853 (9th Cir. 1955) (***"Van Buren I"***), the Ninth Circuit held that such tariff pilotage provisions created an implied contract between an offering city and a vessel owner requesting such services. However, the Court declared the borrowed servant and indemnity provisions of the 1955 Long Beach Tariff invalid because vessels were forced to use a City pilot.

Following ***Van Buren I***, both Los Angeles and Long Beach eliminated their compulsory pilot tariff provisions. Long Beach's revised tariff was challenged in ***United States v. SS President Van Buren***, 490 F.2d 504 (9th Cir. 1973) (***"Van Buren II"***), in which the Ninth Circuit found that the tariff provisions were voluntary and enforceable. Now, almost 30 years after ***Van Buren I*** and seven years after ***Van Buren II***, the California Supreme Court has stricken the City of Los Angeles Tariff Pilotage provisions as contrary to the policies of the California Tort Claims Act. These provisions were at the time of the DA VERRAZANO accident, practically identical to the Long Beach tariff provision upheld in ***Van Buren II***.

Although the California Supreme Court in parts of its decision cites numerous federal and state cases, its discussion of the enforceability of the tariff as a tariff (*see* Section III of opinion) ignores ***Van Buren II***. Without discussion of the need for uniformity in the maritime law, the Court also fails to address the effect of each coastal state applying its own rules to apportion liability resulting from collisions.

City submits that *Van Buren II* establishes a clear admiralty rule binding the California courts which the savings to suitors clause does not allow a state court to discard.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE CALIFORNIA SUPREME COURT REJECTED THE FEDERAL STANDARD APPLICABLE TO BORROWED SERVANT CASES.

This Court in *Standard Oil Company v. Anderson*, 212 U.S. 215, 219 (1909), and *Denton v. Yazoo & M.V.R. Co.*, 284 U.S. 305 (1931), emphasized that the ability to control an employee at the time of an accident is the determining factor in apportioning liability in borrowed servant cases. The California Surpeme Court rejected this test in favor of a status test. Ignoring the crucial facts recognized by the California Court of Appeal [3/], the Court instead looked at the status of the employee as a general employee of City and did not analyze the actual control over the pilot at the time of the accident.

The correct application of the borrowed servant doctrine to a pilotage case was set forth in *City of Los Angeles v.*

3/ The Court of Appeal decision reported at 114 Cal.App.3d 140, cites testimony demonstrating: (1) The pilot had no authority to command the DA VERRAZANO's crew; (2) all advice of the pilot was accepted or rejected by the master and, if accepted, given by the master to his crew as his orders, and (3) the pilot could be discharged by the vessel master at any time.

Standard Transportation Company, 32 F.2d 988 (9th Cir. 1929), in which the Court stated:

> ". . . In the varied affairs of life it is not always easy to determine where responsibility rests for the act of a servant in the general service of one master but employed in the particular work of another. But the test almost invariably applied is: Whose was the work, and whose the power to control? (United States Supreme Court citations omitted.) While here, the pilot was in the general employ of the City, the work in which he was immediately engaged was the work of the ship or master, and the control to which he was subject was the control of the master. The city was powerless to direct him in the discharge of his duties and was not present to discharge him from the particular service in case of negligence or incompetence. Under such circumstances, we think the cases practically all agree that there was no liability on the part of the city, except perhaps for the employment of a pilot of known incompetence and no such question is presented here."

City respectfully submits these principles apply equally to this case.

CONCLUSION

This Court in *Kossick v. United Fruit Company*, 365 U.S. 765 (1961), ruled that certiorari is properly granted where a case presents novel questions regarding the interplay between state and maritime laws. Over a period of approximately 50 years, the responsibility of cities for pilot-involved accidents has been addressed by the Ninth Circuit Court of Appeals in three major cases. Despite 50 years of litigation, the California Supreme Court demonstrates that the liability for such accident remains in dispute. City respectfully requests that the Court grant its Petition for Certiorari and establish a uniform maritime rule.

DATED: September 13, 1982

Respectfully submitted,

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